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Supreme Court, U.S.
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NO. 97-687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FRANK WOOD, Trustee of the Wood Family Trust,
Petitioner

v.

ELDEN W. BAINBRIDGE, Trustee of the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, et al.,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

HEARTLAND RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's theoretical ruminations concerning the scope of RICO liability are not at issue in this case. The only question presented is whether the Court of Appeals erred in holding that the District Court did not abuse its discretion in dismissing Petitioner's Complaint against 111 of 114 defendants, based on Petitioner's failure to comply with Federal Rules of Civil Procedure 12(b)(6), 8(a), 9(b), and 41(b).

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I. INTRODUCTION

The question presented by this case does not warrant review pursuant to a writ of certiorari. As discussed *infra*, the Ninth Circuit's decision is in harmony with decisions of this Court and with decisions of the other circuits. The Heartland Respondents therefore respectfully request that a writ of certiorari to review the unpublished judgment of the United States Court of Appeals for the Ninth Circuit be denied.

II. CORPORATE DISCLOSURE STATEMENT

None of the Heartland Respondents[1] have any corporate parent companies, subsidiaries (other than wholly-owned subsidiaries), or affiliates that have issued shares to the public.

III. JURISDICTION

The Heartland Respondents do not contest Petitioner's jurisdictional statement at this time, but continue to preserve all personal jurisdiction defenses raised in the courts below.

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[1] The Heartland Respondents are: Heartland Lake Florida, a California limited partnership; Heartland Durham Triangle, a Washington limited partnership; Heartland Morrisville Triangle, a Washington limited partnership; Heartland Lakeland Florida, a Washington limited partnership; Heartland Fort Worth I-35, a Washington limited partnership; Heartland Group, Inc., a Washington corporation; and Heartland limited partnership, a Washington limited partnership. Heartland Lakeland Highway 37-B, a Washington limited partnership was a defendant in the District Court, but Petitioner did not appeal its dismissal to the Court of Appeals.

IV. STATEMENT OF THE CASE

A. Petitioner's Complaint

In 1990 and 1992, Petitioner loaned the Bainbridge Trusts $500,000 and $150,000, respectively. When the Trusts ultimately defaulted on the loans, Petitioner alleged that Mr. Bainbridge misrepresented his net worth, misrepresented the loan collateral, and lied about his intentions to repay the loan.

In May 1993, Petitioner's original attorney, Michael Swaim, filed a straightforward complaint against Elden Bainbridge and his two trusts, stating claims for breach of promissory note and fraud. Sometime after Mr. Swaim filed the original complaint, Dean Browning Webb—a self-proclaimed "RICO[2] Specialist"—replaced Mr. Swaim as Petitioner's counsel. Mr. Webb transformed the original seven-page complaint into a 210-page morass that the trial court described as "simply indecipherable," "wholly conclusory in nature," and "impermissibly vague."[3]

On February 23, 1995, the District Court ordered that if Petitioner chose to file a second amended complaint, he must simultaneously file a RICO case statement stating "in detail and with specificity . . . each defendant and . . . the alleged misconduct and basis of liability for each

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[2] Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961, *et seq*.

[3] Order on Defendants' Motions to Dismiss ("Order"), Tab 671 at 2.

defendant." (Tab 386 at 1.) In response, Petitioner filed his incomprehensible second amended complaint, along with an equally obscure RICO case statement.

Petitioner's 210-page second amended complaint ("Complaint"), names 111 "Secondary Defendants," including the Heartland Respondents.[4] The Complaint is replete with abstract RICO theory, completely devoid of any specific factual allegations against the Secondary Defendants. Rather, all of the defendants are lumped together in generic groups, wherein "said defendants" are alleged to have been involved with unspecified "fraudulent conduct."[5] Petitioner's RICO Case Statement is equally vague and conclusory.

B. The Heartland Respondents

Secondary Defendant Heartland Group, Inc. ("Heartland") is in the business of acquiring land in the path of development for future disposition. From 1984 until approximately 1990, Heartland sponsored approximately 27 land investment limited partnerships (the "Project Partnerships"). Heartland acted as the managing general partner of each Project Partnership, and Secondary

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[4] Petitioner did not serve the Secondary Defendants with his motion for leave to file a second amended complaint. The Heartland Respondents therefore had no notice of—or standing to oppose—the second amended complaint prior to their motion to dismiss.

[5] *See e.g.*, Complaint, Tab 455 at ¶¶ 137, 142, 147, 152, 157, 162, 167, 172, 179.

Defendant Heartland Limited Partnership ("HLP") acted as the initial limited partner and co-general partner of the Project Partnerships. Primary defendant Elden Bainbridge has never been a shareholder, board member, officer, employee, agent, general partner, limited partner, advisor, investor, lender or independent contractor of Heartland or HLP. (Declaration of Kim D. Stephens Regarding Petitioner's Motion for Order to Show Cause Regarding Production of Documents by Bainbridge, Tab 579 at 2-3.)

Mr. Bainbridge, through his trusts or corporations, is but one of the approximately 2,000 passive investors in the various Project Partnerships (some of which are also Secondary Defendants in this action). With the exception of one Project Partnership, Heartland Morrisville Triangle, none of the Bainbridge entities has ever been anything more than a limited partner or note-holder in any of the Project Partnerships joined by Petitioner in this appeal (i.e., Heartland Durham Triangle (leveraged notes), Heartland Fort Worth I-35 (leveraged note), and Heartland Lakeland Florida (limited partner)). Although Bainbridge Investments, Inc., is technically a co-general partner in the Heartland Morrisville Triangle Project Partnership, Heartland is the sole managing general partner and has the sole authority to represent this Project Partnership in connection with all financial matters. (Declaration of Dean Browning Webb, October 27, 1995, Tab 702, Heartland Entities Exhibit No. 2.)

Petitioner does not allege that Bainbridge acted on behalf of any Heartland entity in any of his dealings with Petitioner, nor can Petitioner trace any of the money he invested with Bainbridge to any Heartland entity. The simple truth is that the Heartland defendants constitute legitimate and ongoing businesses that have no relationship whatsoever with Petitioner. Petitioner's obscure and conclusory allegations to the contrary are patently meritless and equally offensive.

C. The District Court Dismissed Petitioner's Claims Pursuant to Fed. R. Civ. P. 12(b)(6), 8(a), 9(b) and 41(b)

In his Complaint, Petitioner sought to hold the Secondary Defendants derivatively liable for Mr. Bainbridge's alleged RICO violations. Petitioner attempted to state claims of conspiracy, aiding and abetting, and *respondeat superior*.

In June 1995, various Secondary Defendants—including the Heartland Respondents—filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), 9(b) and 8(a). On August 30, 1995, the District Court issued an order dismissing Petitioner's Complaint against all of the Secondary Defendants. The court found that Petitioner failed to set forth any allegations that would trigger liability under any currently recognized theory of derivative liability. (*See* Order, Tab 671 at 3-11.)

The court outlined the patent deficiencies in Petitioner's pleadings as follows:

> It is manifest from plaintiff's RICO case statement and the representations by plaintiff's counsel at the hearing that there is no legal or factual basis for the multiple federal and state RICO claims, as well as the related fraudulent transfer and other claims asserted against all of the defendants in the case (with the possible exception of Elden Bainbridge and the 1968 and 1973 Trusts). Plaintiff's conclusory allegations of conspiracy, fraud, aiding and abetting and so forth against the [Secondary Defendants] is based entirely upon the notion that their mere association with Bainbridge subjects them to liability.[6]
>
> In that plaintiff attempts to assert a RICO case against the defendants which is premised upon predicate acts of fraud, the complaint fails to satisfy Fed. R. Civ. P. 9(b).
>
> Further, as noted, the complaint does not comply with Fed. R. Civ P. 8(a), in that it

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[6] The Court summarized the theory underlying Petitioner's claims as follows:

> Shorn of its vague and conclusory verbiage, a short and plain statement of plaintiff's claim against 111 of the 114 defendants is that they were associated with Bainbridge as financial beneficiaries [e.g., his children], in business ventures [e.g., his partners], as charitable entities [e.g., the churches], or professionally [e.g., his attorney] and that they failed to stop him from making misrepresentations to Wood . . . in connection with three loan transactions having nothing to do with them.

(Order, Tab 671 at 2, 8.)

> does not contain a short and plain statement of the various claims.
> In addition, plaintiff's RICO case statement fails to satisfy the court's order of February 23, 1995 and thus dismissal of the case is warranted under Fed. R. Civ. P. 41(b).

(Order, Tab 671 at 11.)

In response to the Secondary Defendants' motions to dismiss, Petitioner made it quite clear that these pleading defects could not be cured. Petitioner asserted in briefs submitted to the District Court that "guilt by association" is the "*causa sine qua non*" of his RICO conspiracy claims against the Secondary Defendants. (Plaintiff's Consolidated RICO Memorandum, Tab 660 at 64; Memorandum of Law in Opposition to Motion to Dismiss, Tab 653 at 52.) At oral argument, Petitioner's counsel conceded that his "guilt by association" theory would subject his own client to liability for the alleged RICO violations, because he too was "associated" with Bainbridge. (Transcript, Tab 670 at 35-36, 51.)

Petitioner has candidly conceded that the reason for advancing claims against the Secondary Defendants was to

reach their perceived "deep pockets."[7] Petitioner's "deep pocket" theory of "guilt by association" was plainly a willful attempt to reach defendants perceived to be able to satisfy a judgment, without any regard to their liability.[8]

The District Court correctly found that regardless of the scope of derivative liability in the RICO context, Petitioner could not state a cognizable claim for relief against the Secondary Defendants based on his theory of "guilt by

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[7] For example, Petitioner argued as follows:

> [*Brady v. Dairy Fresh Products, Co.* 974 F.2d 1149 (9th Cir. 1992)] strengthens the position of RICO plaintiffs to aggressively prosecute separate claims premised under this theory in order to reach a "deep pocket defendant."

(Plaintiff's memorandum in Opposition to Heartland Defendants' Motion to Dismiss, Tab 653 at 41 (citations omitted).)

Petitioner further clarified the reason for his "deep pocket" approach as follows:

> Plaintiffs original and successor counsel, by and through their pleadings, emphasized the necessity of advancing those claims in order to assure plaintiff's ultimate execution of a judgment upon defendants that could satisfy the judgment.

(Memorandum of Law in Response to C.R. 11 Motion, Tab 700 at 10.)

[8] The complete lack of Respondents' culpability is plainly demonstrated by Petitioner's RICO Case Statement (Tab 526); the statements made by Petitioner's counsel at oral argument on Respondents' Rule 12 motions (*see e.g.*, Transcript of Proceedings dated August 17, 1995, Tab 670 at 11-12); and the complete absence of factual support in the affidavits of Petitioner and his counsel (Affidavit of Frank Wood, December 7, 1995, Tab 722 at 1-8; Affidavit of Dean Browning Webb, October 27, 1995, Tab 702 at 20-22)

association."[9] The court concluded that in view of Petitioner's "erroneous legal theory of the case and his inability to provide the requisite specificity for his factual allegations in the complaint and the RICO case statement, . . . allowing him leave to amend against any defendants other than Bainbridge and the 1968 and 1973 Trusts would be futile." (Order, Tab 671 at 12.)

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[9] The District Court's rejection of Plaintiff's theory is sound. As the Fifth Circuit Court of Appeals noted in *United States v. Martino*, 648 F.2d 367 (1981), *cert. denied*, 456 U.S. 949 (1982): "We rejected the argument that RICO unconstitutionally punishes associational status; its proscriptions are directed against conduct, not status." The Fifth Circuit previously noted: The Act does not authorize that individuals 'be tried en masse for the conglomeration of distinct and separate offenses committed by others.' [citation omitted.] Nor does it punish mere association with conspirators or knowledge of illegal activity; its proscriptions are directed against conduct, not status. [citation omitted.] To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act. *U.S. v. Elliott*, 571 F.2d 880, 903 (1978), *cert. denied*, 439 U.S. 953 (1978) (emphasis added).

The Ninth Circuit standard is the same. As the Ninth Circuit Court of Appeals noted in *United States v. Tille*, 729 F.2d 615, 619 (1984), *cert. denied*, 469 U.S. 845 (1984), to establish a RICO conspiracy, a plaintiff must plead and prove: (1) each defendant's personal participation, by act or agreement, in the predicate offenses; or (2) an agreement, the objective of which is a substantive RICO violation. Petitioner pled neither.

Even under the *Pinkerton* doctrine (*Pinkerton v. United States*, 328 U.S. 640 (1946))—which Petitioner urges should apply in civil actions—one must allege an unlawful agreement among the co-conspirators, the purpose of which is a substantive RICO violation. Petitioner failed to plead such an agreement by any of the Secondary Defendants.

The court accordingly dismissed the 111 Secondary Defendants with prejudice. The court further found that Petitioner's Complaint was frivolous and imposed non-monetary sanctions against Petitioner's counsel.[10]

Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals on March 11, 1996.

D. The Court of Appeals Rejected Petitioner's Assertion that the District Court Abused its Discretion in Dismissing Petitioner's Frivolous Claims.

In his opening brief to the Ninth Circuit Court of Appeals, Petitioner principally provided a recitation of current black-letter law regarding the scope of derivative liability under RICO. The Court of Appeals felt it unnecessary to reach the merits of Petitioner's RICO dissertation. Rather, the Court simply "review[ed] for abuse of discretion the magistrate judge's dismissal under Fed. R. Civ. P. 8(a), 9(b) and 41(b)."

Unanimously finding the case suitable for decision without oral argument, the Court held that "The complaint

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[10] Unfortunately, the Heartland Defendants are not the first victims of Mr. Webb's penchant for filing frivolous RICO claims. For example, in *Salstrom v. Citicorp Credit Services, Inc.*, 74 F.3d 183 (9th Cir. 1996), *cert. denied, Webb v. Citicorp Credit Servs.*, 1996 U.S. LEXIS 4704 (1996), Mr. Webb transformed a "simple straightforward debt collection action into a full-fledged assault that prompted the [district court] to impose sanctions."[10] *Id.* at 185. The district court awarded sanctions against Mr. Webb under 28 U.S.C. § 1927, and non-monetary sanctions under the court's inherent power.[10] *Salstrom v. Citicorp Credit Services, Inc.*, Civil No. 92-1226-AS, Order dated July 27, 1994. The Ninth Circuit affirmed these sanctions.

rambles on about elaborate legal theories and relationships without identifying specific conduct on the part of the 111 [Secondary Defendants] that would subject them to RICO liability."

The Court also imposed monetary sanctions under Fed. R. App. P. 38, justifying its decision as follows:

> [Petitioner] has grossly disregarded Federal Rule of Civil Procedure 8(a)'s requirement that the complaint contain a "short and plain statement of the claim." This disregard has caused the district court, this court, and defendants to spend an extraordinary amount of time and resources deciphering his complaint. On appeal, [Petitioner] again has failed to identify how his 210-page complaint states a claim against any of the secondary defendants. Rather, he assures the court that if given the opportunity, he can cure its defects. For these reasons, we find that this appeal is frivolous. By separate order we grant the Rule 38 motion.

(Unpublished Ninth Circuit Memorandum Opinion, No. 96-35289, dated June 11, 1997 at 3-4.)[11]

Petitioner's failure to provide the Court of Appeals with any specificity regarding his ability to cure the pleading defects of his RICO claims is astonishing in view of the District Court's admonition to Petitioner's Counsel during

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[11] The extent of the monetary sanctions is yet to be determined pursuant to Respondents' respective applications for damages and costs presently pending before appellate commissioner Robert Shaw.

the hearing on defendants' motions for sanctions in November 1995:

> [Y]our problem, Mr. Webb, is you deal strictly in the abstract and the general. When it comes time to mov[e] from the abstract to the particular and to specifics, that's where . . . quite frankly, you drop the ball . . . . Your abstract theories and general theories are one thing, but when it comes time to bringing lawsuits against specific people and entities and bringing them into court and causing them all the related harm that . . . litigation brings, there has to be a specific justification for it. And just dealing in the abstract doesn't cut it.

(Transcript of Hearing on Defendants' Motions for Sanctions, November 13, 1995, Tab 719 at 41-42.)

V. REASONS FOR DENYING PETITION

This Court will grant a petition for a writ of certiorari only for "compelling reasons," which include *inter alia*: (1) entry of a decision in conflict with the decision of another circuit regarding an important matter; (2) extreme departure from the accepted and usual course of judicial proceedings; and (3) entry of a decision in conflict with the relevant decisions of this Court. Sup. Ct. R. 10.

These considerations plainly militate against granting a writ of certiorari in this case. This Court and the circuit courts are in full accord that a district court may dismiss a complaint with prejudice where deficiencies in a pleading cannot be overcome—where amendment would be futile.

See e.g., *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129 (2nd Cir. 1993); *Sooner Prods. Co. v. McBride*, 708 F.2d 510 (10th Cir. 1983); *Jafree v. Barber*, 689 F.2d 640 (7th Cir. 1982). This Court has expressly recognized that "the grant or denial of an opportunity to amend is within the discretion of the District Court." *Foman v. Davis*, 371 U.S. 178,182 (1962). Petitioner cites no reason whatsoever—never mind a compelling one—to revisit this issue.

VI. CONCLUSION

In his Petition for Writ of Certiorari, Petitioner continues to deal in the abstract, yet again forcing Respondents to incur attorneys' fees and costs in defending against legal theories devoid of facts, rather than against a justiciable controversy. Petitioner's decidedly frivolous petition for writ of certiorari should be denied, and the Heartland Respondents should be awarded damages and costs pursuant to Sup. Ct. R. 42.

RESPECTFULLY SUBMITTED this 17th day of November, 1997.

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